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7                   UNITED STATES DISTRICT COURT  
8                   DISTRICT OF MASSACHUSETTS  
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11 N.R., by and through his parents and  
12 guardians, S.R. and T.R., individually and  
13 on behalf of all others similarly situated,  
14 and derivatively on behalf of the Raytheon  
15 Health Benefits Plan,

16                   NO.

17                   Plaintiff,

18                   **CLASS ACTION COMPLAINT**

19                   v.

20                   RAYTHEON COMPANY; RAYTHEON  
21                   HEALTH BENEFITS PLAN; AND  
22                   WILLIAM M. BULL,

23                   Defendants.

24                   **I. PARTIES**

25                   1.        **N.R.** Plaintiff N.R. is the five-year-old son and dependent of S.R. and T.R.,  
26 and resides in Middlesex County, Massachusetts. N.R. is a beneficiary, as defined by the  
Employment Retirement Security of Act of 1974 ("ERISA") § 3(8), 29 U.S.C. § 1002(8), of  
the Raytheon Health Benefit Plan. N.R.'s coverage is through T.R.'s employment with  
Raytheon Company.

1       2.     ***Raytheon Health Benefit Plan.*** Defendant Raytheon Health Benefit Plan  
2 ("Plan") is an employee welfare benefit plan under ERISA. The Plan provides health  
3 benefits for Raytheon employees and their dependents such as N.R.

4       3.     ***Raytheon Company.*** Raytheon Company ("Raytheon") is the "Plan  
5 Sponsor" and is a named fiduciary under ERISA.

6       4.     ***William M. Bull.*** William M. Bull, Vice President - Compensation,  
7 Benefits, Performance Development, Mergers & Acquisitions and Workforce  
8 Intelligence at Raytheon is the "Plan Administrator" and a named fiduciary under  
9 ERISA. The Plan, Raytheon and Mr. Bull shall be collectively referred to as  
10 "Defendants."

## 11                   **II. JURISDICTION AND VENUE**

12       5.     Jurisdiction of this Court arises pursuant to ERISA § 502(e)(1), 29 U.S.C.  
13 § 1132(e)(1).

14       6.     Venue is proper under ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because,  
15 *inter alia*, a defendant resides or may be found in this district.

16       7.     In conformity with 29 U.S.C. § 1132(h), Plaintiff has served this Amended  
17 Complaint by certified mail on the Secretary of Labor and the Secretary of Treasury.

## 18                   **III. NATURE OF THE CASE**

19       8.     N.R. seeks to end Defendants' standard practice of discrimination against  
20 N.R. and other participants and beneficiaries with autism spectrum disorder ("ASD")  
21 and other developmental mental health conditions in the provision of Defendants' health  
22 benefits. Timely and intensive provision of medically necessary speech therapy can  
23 dramatically improve the health and life-long well-being of enrollees with ASD and  
24 other developmental mental health conditions. Speech therapy services that treat  
25 developmental mental health conditions can be medically necessary, even when the  
26 service is provided when there is no documented prior loss of speech.

1       9. Defendants, however, exclude all coverage of medically necessary speech  
 2 therapy to treat developmental mental health conditions based solely on the Plan's  
 3 exclusion of coverage of speech therapy that is "non-restorative." In addition to the  
 4 "non-restorative speech therapy" exclusion, Defendants' Plan includes two additional  
 5 similar exclusions: "non-restorative ABA speech therapy," and "habilitation services."  
 6 Collectively, these three exclusions are referred to in this Complaint as the "Non-  
 7 Restorative Exclusions" or the "Exclusions." The Plan's Non-Restorative Exclusions are  
 8 aimed at eliminating coverage of speech therapy and other services for developmental  
 9 mental health conditions. As such, the Exclusions are a proxy for disability  
 10 discrimination, and improperly exclude coverage of medically necessary services to  
 11 enrollees with developmental mental health conditions. Plaintiff seeks to enforce the  
 12 Federal Mental Health Parity Act, through ERISA and the terms of the Plan to end such  
 13 discriminatory practices.

14      10. On October 3, 2008, Congress passed the Paul Wellstone and Pete  
 15 Domenici Mental Health Parity and Addiction Equity Act of 2008 (the "Parity Act"). The  
 16 Parity Act expanded the scope of previous federal legislation on access to mental health  
 17 coverage and was "designed to end discrimination in the provision of coverage for  
 18 mental health and substance use disorders, as compared to medical and surgical  
 19 conditions." *Coalition for Parity v. Sebelius*, 709 F. Supp. 2d 10, 13 (D.D.C. 2010). The  
 20 Parity Act requires that the exclusions and limitations imposed on mental health benefits  
 21 are "no more restrictive" than those applied to substantially all medical and surgical  
 22 benefits. *See* 29 U.S.C. § 1185a(a)(3); 42 U.S.C. § 300gg-5(a)(3); 26 U.S.C. § 9812(a)(3). The  
 23 Parity Act took effect as of October 3, 2009.

24      11. The Parity Act requires that if Defendants cover mental health conditions  
 25 at all (and they do), Defendants must cover services to treat mental health conditions  
 26 without special treatment limitations only imposed on such services. 29 U.S.C.

1       § 1185a(3)(A)(ii). It further requires that Defendants ensure that any treatment  
 2 limitations imposed on coverage for services to treat mental health conditions are no  
 3 more restrictive than the predominant treatment limitations imposed on substantially all  
 4 of the coverage for services to treat medical and surgical conditions. *Id.*

5       12. Defendants violate the Parity Act when they apply a blanket exclusion of  
 6 coverage for speech therapy or other services to treat developmental mental health  
 7 conditions pursuant to their Non-Restorative Exclusions. Defendants apply this uniform  
 8 policy even when the service is medically necessary to treat the developmental mental  
 9 health condition. Defendants apply the Exclusions, despite covering the same service  
 10 for non-mental health conditions, such as when needed to treat a stroke or physical  
 11 injury resulting from an accident. Specifically, Defendants denied Plaintiff N.R.'s  
 12 request for coverage of medically necessary speech therapy to treat his ASD. When N.R.  
 13 appealed, Defendants denied his appeal, asserting that speech therapy to treat N.R.'s  
 14 diagnosis of ASD was excluded from the Plan solely as "non-restorative."

15       13. Defendants' uniform exclusion of speech therapy and other services to  
 16 treat certain developmental mental health conditions pursuant to its Non-Restorative  
 17 Exclusions violates the requirements of the Parity Act, 29 U.S.C. § 1185a, and its  
 18 implementing regulations, which are incorporated in the Plan as additional "terms of  
 19 the plan" under ERISA. By failing to comply with the Parity Act and the terms of the  
 20 Plan, Defendants systemically and uniformly fail to properly process claims and  
 21 administer the Plan. The Plan's participants and beneficiaries have not received the  
 22 benefits they are entitled to under the Plan as modified by the Parity Act. The Plan's  
 23 participants and beneficiaries are also misinformed by Defendants with respect to their  
 24 right to coverage under the Plan and the Parity Act.

25       14. This lawsuit seeks remedies for Defendants' breach of fiduciary duty  
 26 under ERISA. It further seeks to recover the benefits that have been wrongfully denied

1 to N.R. and the proposed class. It also seeks a court order declaring Defendants' Non-  
 2 Restorative Exclusions illegal and void. The lawsuit further seeks an injunction to  
 3 prevent future or ongoing efforts by Defendants to use and enforce the Non-Restorative  
 4 Exclusions, or any other similar plan provisions that impermissibly deny, exclude or  
 5 limit enrollees' access to medically necessary speech therapy or other services to treat  
 6 developmental mental health conditions. Finally, it seeks to require Defendants to  
 7 provide accurate information concerning coverage of speech and habilitative therapies  
 8 to treat developmental mental health conditions under the Plan.

#### 9                          IV. CLASS ALLEGATIONS

10        15. *Definition of Class.* N.R. proposes the following class:

11                          All individuals who:

12                          (a) have been, are, or will be participants or beneficiaries under  
 13                          the Raytheon Health Benefit Plan in effect or renewed on or  
 14                          after January 24, 2014; and

15                          (b) who have received, require, or are expected to require  
 16                          services for the treatment of a qualified mental health  
 17                          condition that are excluded by the Plan pursuant to the "non-  
                                 restorative speech therapy," "non-restorative ABA speech  
                                 therapy," and "habilitative services" exclusions.

18                          Definition: The term "qualified mental health condition" shall  
 19                          mean a condition listed in the most recent Diagnostic and  
 20                          Statistical Manual of Mental Disorders published by the  
 21                          American Psychiatric Association to which Defendants  
 22                          applied and/or currently apply the Plan's "non-restorative  
                                 speech therapy," "non-restorative ABA speech therapy," and  
                                 "habilitative services" exclusions.

23        16. *Size of Class.* The class of persons who have been, are or will be  
 24                          participants or beneficiaries under the Plan since January 24, 2014, and who have  
 25                          received, require or are expected to require speech or other services that are subject to

1 the Plan's Non-Restorative Exclusions is expected to number at least in the hundreds  
2 and is so large that joinder of all members is impracticable.

3       17. *Class Representative N.R.* Named plaintiff N.R. is an enrollee in the Plan.  
4 N.R. is diagnosed with ASD, a mental health condition listed in the most recent  
5 Diagnostic and Statistical Manual of Mental Disorders (DSM). N.R. needs speech  
6 therapy to treat his ASD. Defendants denied N.R.'s request for coverage of speech  
7 therapy services as excluded under the Plan pursuant to the Non-Restorative Exclusions.  
8 His claims are typical of the claims of the other members of the class, and through his  
9 parents, he will fairly and adequately represent the interests of this class.

10       18. *Common Questions of Law and Fact.* This action requires a determination  
11 of whether Defendants' policies and practices that deny, exclude and/or limit coverage  
12 of services to treat qualified mental health conditions pursuant to the Non-Restorative  
13 Exclusion violates the terms of the Plan and the Federal Mental Health Parity Act.  
14 Adjudication of this issue will in turn determine whether Defendants are liable under  
15 ERISA for their conduct.

16       19. *Separate suits would create risk of varying conduct requirements.* The  
17 prosecution of separate actions by class members against Defendants would create a risk  
18 of inconsistent or varying adjudications with respect to individual class members that  
19 would establish incompatible standards of conduct. Certification is therefore proper  
20 under Federal Rule of Civil Procedure 23(b)(1).

21       20. *Defendants have acted on grounds generally applicable to the class.*  
22 Defendants, by applying the Non-Restorative Exclusions which result in the exclusion  
23 and improper limitation of coverage of services to treat qualified mental health  
24 conditions, have acted on grounds generally applicable to the class, rendering  
25 declaratory relief appropriate respecting the entire class. Certification is therefore  
26 proper under Federal Rule of Civil Procedure 23(b)(2).

**21. Questions of law and fact common to the class predominate over individual issues.** The claims of the individual class members are more efficiently adjudicated on a class-wide basis. Any interest that individual members of the classes may have in individually controlling the prosecution of separate actions is outweighed by the efficiency of the class action mechanism. Upon information and belief, there is no pending class action suit filed against the Defendants for the same relief requested in this action.

22. *Venue.* This action can be most efficiently prosecuted as a class action in the District of Massachusetts, where defendant Raytheon does business and where N.R. resides. Issues as to Defendants' conduct in applying standard policies and practices towards all members of the class predominate over questions, if any, unique to members of the class. Certification is therefore additionally proper under Federal Rule of Civil Procedure 23(b)(3).

23. *Class Counsel.* N.R. has retained experienced and competent class counsel.

## **V. FACTUAL BACKGROUND**

## **A. N.R.'s Administrative Appeal**

24. N.R. is a five-year old child who was diagnosed with autism spectrum disorder in 2017 by Sarah Barnett, M.D.

25. Dr. Barnett recommends that N.R. receive speech therapy services to treat his ASD. *See Appendix 10.*

26. N.R.'s speech therapy is provided by Ann Kulichik, MS, CCC-SLP/I, BRS-S. Ms. Kulichik is a licensed Speech Language Pathologist.

27. Ms. Kulichik provided speech therapy to treat N.R.'s identified diagnoses of ASD (F84.0), Mixed receptive-expressive language disorder (F80.2), and phonological disorder (F80.0). *See Appendix 1*, pp. 3-4. These conditions are all listed in the "Mental,

1 Behavioral and Neurodevelopmental Disorders" chapter of the International Statistical  
 2 Classification of Diseases and Related Health Problems, 10th Revision, known as the  
 3 ICD-10. These conditions all correspond to specific mental health conditions listed in  
 4 the latest version of the Diagnostic and Statistical Manual of Mental Disorders ("DSM").

5       28. Ms. Kulichik also noted certain symptoms, signs and abnormal clinical  
 6 findings that did not correspond to any specific diagnosis, identified in the "R" chapter  
 7 of the ICD-10. The "R" chapter is titled, "Symptoms, Signs and Abnormal Clinical and  
 8 Laboratory Findings, Not Elsewhere Classified (R00-R99)." Those symptoms included  
 9 dysarthria and anarthria (R47.1) and dysphagia, oral phase (R13.11). *See Appendix 1.*  
 10 These symptoms and signs codes are not diagnosis codes, and do not reflect either  
 11 "mental health" or "medical/surgical" conditions.

12       29. Ms. Kulichik submitted N.R.'s claims for speech therapy using the  
 13 procedure or CPT (current procedural terminology) code of "92507." *See id.*, p. 5. This  
 14 code is used to describe the delivery of treatment for speech, language, voice,  
 15 communication and/or auditory processing disorders. According to the American  
 16 Speech-Language-Hearing Association, this CPT code is very comprehensive and  
 17 generally includes all components of treatment.<sup>1</sup> This CPT code may be used when  
 18 speech therapy is provided to treat a developmental mental health condition like ASD  
 19 or a medical condition like a stroke or physical injury.

20       30. On at least one occasion, Ms. Kulichik submitted a claim with the CPT code  
 21 92526, which is for treatment of swallowing dysfunction and/or oral function for  
 22 feeding. *See Appendix 1*, p. 7. Based on information and belief, this CPT code may be  
 23  
 24

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25       <sup>1</sup> See [https://www.asha.org/practice/reimbursement/coding/coding\\_faqs\\_slp/#:~:targetText=CPT%20code%2092507%20\(treatment%20of,includes%20all%20components%20of%20treatment](https://www.asha.org/practice/reimbursement/coding/coding_faqs_slp/#:~:targetText=CPT%20code%2092507%20(treatment%20of,includes%20all%20components%20of%20treatment). (last visited 12/5/19).

1 used when speech therapy is provided to treat a developmental mental health condition  
2 like ASD or a medical condition like a stroke or physical injury.

3 31. All of N.R.'s claims for speech therapy were denied by United Healthcare  
4 ("United"), the Plan's third-party administrator.

5 32. The reason for the denials contained in the Explanations of Benefits to  
6 N.R.'s parents was "3A" which was explained as "this service is not covered for the  
7 diagnosis listed on the claim." *See e.g., Appendix 2.* The Explanation referred N.R.'s  
8 parents to the "plan documents" generally but did not identify any specific language in  
9 the plan upon which the denial was based. All of the denials that N.R.'s parents received  
10 contained the identical language and did not identify any specific plan language that  
11 resulted in the exclusion of N.R.'s speech therapy.

12 33. On April 22, 2019, N.R.'s parents appealed United's denial of coverage for  
13 N.R.'s speech therapy. *See Appendix 11; Appendix 1*, p. 11.

14 34. The appeal letter included multiple letters of medical necessity, including  
15 from N.R.'s speech pathologist and his board-certified behavior analyst. *Appendices 5-*  
16 **6.**

17 35. N.R.'s parents argued that the Plan's exclusion of "non-restorative" speech  
18 therapy violated the Parity Act. *See Appendix 11*, pp. 2, 5-8.

19 36. By letter dated July 31, 2019, United denied the first level appeal filed by  
20 N.R.'s parents. For the first time, United disclosed the specific plan language that was  
21 the basis for the denial. United disclosed the following reason for the denial of coverage:

22 You are asking for speech therapy. This is for your child. Your  
23 child is autistic. Your child does not speak clearly. Your  
24 benefit document covers speech therapy if your child lost  
25 speech. It is to restore speech that was lost. Your child has not  
had speech that was lost. Therefore, speech therapy is not  
covered. The appeal is denied.

26 *Appendix 3.*

1       37. The denial did not address the legal arguments made by N.R.'s parents  
 2 that the Non-Restorative Exclusions violate the Parity Act.

3       38. On August 8, 2019, N.R.'s parents submitted a lengthy second level appeal  
 4 of the Plan's denial of coverage for his speech therapy. *See Appendix 4.*

5       39. They included the letters of medical necessity from N.R.'s speech  
 6 pathologist and his board-certified behavior analyst and made additional legal argument  
 7 regarding the illegality of defendants' Non-Restorative Exclusions. *See Appendix 4,*  
 8 pp. 2, 5-8.

9       40. On September 12, 2019, United denied the second level appeal. The second  
 10 denial letter stated:

11      I have reviewed the information that was submitted for this  
 12 appeal. I have also reviewed your benefits. You have  
 13 requested speech therapy for your child. This therapy is a  
 14 benefit under your health plan only if your child's (*sic*) had  
 speech that was lost. Based on your health plan guidelines,  
 your request is denied.

15 *Appendix 7.* The denial did not address the legal arguments made by N.R.'s parents.

16       41. After the appeals process was completed, N.R.'s parents requested all of  
 17 the documents relied upon by United, including the internal communications and notes.

18       42. United's internal records reflect that no medical necessity review was  
 19 conducted. *Appendix 1*, pp. 2-3 ("Medical Necessity Review: No").

20       43. N.R.'s speech therapy is medically necessary to treat his conditions.  
 21 Defendants have never disputed that N.R.'s speech therapy is medically necessary.

22       44. For the first level appeal, United's Samuel T. Wilmit, MD, FAAP reviewed  
 23 the appeal. Dr. Wilmit concluded that:

24      [T]o be considered covered services, speech and nonverbal  
 25 communication services must comply with restorative only  
 26 requirements. To be considered restorative, the speech or  
 nonverbal communication function must have been

1 previously intact. With this member, this is not the case.  
 2 Therefore speech therapy is excluded from coverage  
 3 /07/18/2019.

4 ***Appendix 1***, p. 10.

5 45. Dr. Wilmit does not identify the source for his conclusion that N.R. did not  
 6 have "previously intact" speech or nonverbal communication. No effort to reach out to  
 7 N.R.'s pediatrician or Ms. Kulichik was undertaken. *See id.*, p. 16 ("PEER TO PEER: Not  
 8 applicable"). Instead, it appears that Dr. Wilmit concluded that coverage was  
 unavailable due solely to N.R.'s diagnoses. *See id.*, p. 11.

9 46. United also provided the internal notes for the second level appeal.

10 47. The United internal notes for the second appeal state:

11 This request is for speech therapy for a 4 year-old boy. This  
 12 child has autism and a speech disorder. There is no  
 13 documentation that speech therapy is needed for restoration  
 14 of speech. The speech therapy is not a covered benefit and the  
 request is denied.

15 *Id.*, p. 16. There is no evidence in the United notes that the reviewer considered N.R.'s  
 16 parents' legal argument that the non-restorative exclusions violated the Parity Act. *See*  
*id.*

17 48. After exhausting both levels of internal appeal within the Raytheon Plan,  
 18 N.R.'s parents, through counsel, contacted Raytheon and United Healthcare to obtain  
 19 (a) the list of non-mental health conditions to which the Plan applies the "non-  
 20 restorative" speech therapy exclusion, and (b) the "medical necessity criteria for both  
 21 medical/surgical benefits and mental health and substance use disorder benefits, as well  
 22 as the processes, strategies, evidentiary standards and other factors used to apply" the  
 23 "non-restorative speech therapy" exclusion, the "non-restorative ABA speech therapy"  
 24 exclusion and the exclusion of "habilitative services" under the Plan. *See* 29 C.F.R.  
 25  
 26

1 § 2590.712(d)(3); *Appendix 8*. No response was received by N.R., his parents or his  
2 counsel.

3 **B. Classwide Factual Allegations**

4 49. During certain time periods on and after January 24, 2014, N.R. and  
5 members of the class have been, are or will be participants or beneficiaries of the Plan,  
6 which is subject to ERISA pursuant to 29 U.S.C. § 1003.

7 50. Since January 24, 2014, and continuing to the present, N.R. and other  
8 members of the class have been diagnosed with qualified mental health conditions,  
9 including ASD.

10 51. N.R. and other members of the class have required, currently require or  
11 will require speech therapy to treat their qualified mental health conditions. Defendants,  
12 however, have excluded all coverage of such treatment through the application of the  
13 “non-restorative” exclusion.

14 52. Based upon N.R.’s administrative record, and information and belief, N.R.  
15 and members of the proposed class have been and will continue to be denied coverage  
16 of medically necessary speech therapy and habilitative services due solely to  
17 Defendants’ application of the non-restorative exclusions.

18 53. The application of this uniform exclusion is not “at parity” with the Plan’s  
19 coverage of medical/surgical services.

20 54. For example, the 2019 Summary Plan Document describes coverage of  
21 medical/surgical services for congenital conditions. *Appendix 12*, p. 31 (Congenital  
22 heart disease is covered); p. 33 (congenital malformations resulting in infertility are  
23 covered). Coverage for these conditions is not limited to only “restorative” treatment.

24 55. There is no general exclusion for “non-restorative” treatment in the Plan.  
25 *Id.*, pp. 67-82. There is no special exclusion in the Plan for “non-restorative” treatment  
26 that applies to medical and surgical conditions. *Id.* Indeed, the “habilitative” exclusion

1 in the Plan applies only to mental health services. *Id.*, p. 79 (“the following *mental health*  
 2 (*including Autism Spectrum Disorder (ASD) services*)/*substance-related and addictive*  
 3 *disorders* services are not covered:... Habilitative services, which are health care services  
 4 that help a person keep, learn or improve skills and functioning for daily living, such as  
 5 non-restorative ABA speech therapy.”).

6       56. Based upon the plain language of the Plan document and N.R.’s  
 7 administrative records, the only services that are subject to the Plan’s “non-restorative”  
 8 exclusions are services that are used to treat developmental mental health conditions,  
 9 such as ASD.

10       57. Based upon the plain language of the Plan document and N.R.’s  
 11 administrative records, the Plan and United exclude “non-restorative speech therapy,”  
 12 “non-restorative ABA speech therapy” and “habilitative services” based upon whether  
 13 the claims for the services were submitted with certain developmental mental health  
 14 condition diagnostic codes and/or various symptoms and signs codes associated with  
 15 certain developmental mental health conditions.

16       58. Based upon N.R.’s administrative record, the Plan and United fail to  
 17 conduct an individualized review of claims denied pursuant to the “Non-Restorative  
 18 Exclusions” to determine, in each instance, whether the enrollee once had speech that  
 19 was lost. Instead, the Plan and United automatically deny coverage based upon a  
 20 specific list of ICD-10 codes deemed to be “non-restorative.” *See e.g., Appendix 1*, p. 2  
 21 (“Medical Necessity Review: No”); p. 3 (“This service is not covered for the diagnosis  
 22 listed on the claim.”).

23       59. As a result, N.R. and other members of the class have paid for medically  
 24 necessary speech therapy and other services out of their own pockets or face the  
 25 imminent threat that they will have to do so in the near future. Other class members  
 26 have been forced to forgo needed treatment due to Defendants’ conduct.

1       60. In light of the established Plan documents, statements and written  
2 representations by Defendants to the parents and providers of N.R. and other members  
3 of the class, any attempt by class members to pursue administrative remedies is futile.  
4 Nonetheless, N.R. has completed both levels of the Plan's internal appeal process to no  
5 avail. He has exhausted his administrative remedies.

## **VI. CLAIMS FOR RELIEF**

## **FIRST CLAIM:**

## BREACH OF FIDUCIARY DUTIES

ERISA §§ 404(a)(1), 502(a)(2); 29 U.S.C. §§ 1104(a), 1132 (a)(2)

61. N.R. re-alleges all paragraphs above.

62. Defendant Raytheon Company is a fiduciary under ERISA § 3(21)(A),  
29 U.S.C. § 1002(21)(A), because it is the “Plan Sponsor” and is a named Plan fiduciary.  
Defendant Raytheon Company exercises discretionary authority or discretionary control  
with respect to the denial and appeal of denied claims under the Plan.

63. Defendant William Bull is a fiduciary under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because he is the Plan Administrator and a named Plan fiduciary. Defendant Bull exercises discretionary authority or discretionary control with respect to the denial and appeal of denied claims under the Plan.

64. ERISA imposes strict fiduciary duties upon plan fiduciaries. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C), states, in relevant part, that a plan fiduciary must discharge its duties with respect to a plan “solely in the interest of the participants and beneficiaries and ... in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and Title IV.”

65. ERISA § 409(a), 29 U.S.C. § 1109(a), states, in relevant part:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable

1 to make good to such plan any losses to the Plan resulting from  
2 each such breach, and to restore to such plan any profits of  
3 such fiduciary which have been made through each such  
4 breach, and to restore to such plan any profits of such fiduciary  
5 which have been made through use of assets of the Plan by the  
fiduciary, and shall be subject to such other equitable or  
remedial relief as the court may deem appropriate, including  
removal of such fiduciary.

66. The terms of an ERISA plan include non-preempted provisions of  
7 substantive law, such as the requirements in the Parity Act. Defendants have failed to  
8 comply with the terms of the Plan, which include the requirements of the Parity Act and  
9 its implementing regulations.

10 67. Defendants violated their obligations under ERISA § 404(a)(1), 29 U.S.C.  
11 § 1104(a)(1), by failing to act in accordance with the documents and instruments  
12 governing the Plan, and breached their fiduciary duties to the Plan, N.R. and all class  
13 members.

14 68. As a direct and proximate result of these acts and omissions, N.R., and  
15 other class members have suffered harm and losses and are entitled to relief under  
16 ERISA against Defendants.

17 69. N.R., and class members seek relief compelling Defendants to restore all  
18 losses arising from the breaches of fiduciary duties that occurred when treatment was  
19 denied that is required by the terms of the Plan as modified by the Parity Act.

20 **SECOND CLAIM:**  
21 **CLAIM FOR RECOVERY OF BENEFITS, CLARIFICATION OF RIGHTS**  
**UNDER TERMS OF THE PLANS AND CLARIFICATION OF**  
**RIGHT TO FUTURE BENEFITS UNDER THE PLAN**  
**ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)**

23 70. N.R. re-alleges all the paragraphs above.

24 71. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), provides that a participant  
25 or beneficiary may bring an action to "recover benefits due to him under the terms of his  
26

1 plan, to enforce his rights under the terms of the plan, or to clarify his rights to future  
2 benefits under the terms of the plan."

3       72. N.R. and the class are entitled to recover benefits due them under the terms  
4 of the Plan. They are also entitled to a declaration of present and future rights to  
5 coverage of speech therapy to treat qualified mental health conditions.

### **THIRD CLAIM:**

**CLAIM TO ENJOIN ACTS AND PRACTICES IN VIOLATION OF THE TERMS  
OF THE PLANS, TO OBTAIN OTHER EQUITABLE RELIEF AND TO  
ENFORCE THE TERMS OF THE PLANS  
ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)**

73. N.R. re-alleges all the paragraphs above.

10       74. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), provides that a participant or  
11 beneficiary may “enjoin any act or practice which violates any provision of this  
12 subchapter or the terms of the plan.” N.R. and the class seek to enjoin Defendants from  
13 continuing to apply exclusions and limitations on all coverage of speech therapy to treat  
14 qualified mental health conditions. N.R. and the class also seek corrective notice and  
15 reformation of the relevant Plan documents.

16       75. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), further provides that a  
17 participant or beneficiary may obtain other appropriate equitable relief to redress  
18 violations of ERISA or enforce plan terms. To the extent full relief is not available under  
19 ERISA § 502(a)(1)(b), 29 U.S.C. § 1132(a)(1)(B) or ERISA § 502(a)(2), 29 U.S.C.  
20 § 1132(a)(2), then N.R. and the class seek equitable remedies including, without  
21 limitation, unjust enrichment, disgorgement, restitution, surcharge and consequential  
22 damages arising out of the Defendants' failure to administer the terms of the Plan as  
23 modified by the Parity Act and implementing regulations.

**FOURTH CLAIM:  
VIOLATION OF ERISA AND MENTAL HEALTH PARITY  
DISCLOSURE REQUIREMENTS**  
**ERISA § 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A)**

76. N.R. realleges all the paragraphs above.

77. Plaintiff seeks sanctions for up to \$110 per day for defendants' failure to produce or ensure the production of the "medical necessity criteria for both medical/surgical benefits and mental health and substance use disorder benefits, as well as the processes, strategies, evidentiary standards and other factors used to apply" the Non-Restorative Exclusion. *See* 29 U.S.C. § 1024(b)(4); 29 C.F.R. § 2590.712(d)(3); 29 C.F.R. § 2520.104b-1; 29 C.F.R. § 2575.502c-1; *Appendix 8.*

## **VII. DEMAND FOR RELIEF**

78. WHEREFORE, N.R. requests that this Court:

(a) Certify this case as a class action; designate named plaintiff N.R., by and through his parents, S.R. and T.R., as class representative, and designate SIRIANNI YOUTZ SPOONEMORE HAMBURGER, PLLC, Eleanor Hamburger and Richard E. Spoonemore, and FAIR WORK, P.C., Stephen Churchill, as class counsel;

(b) Enter judgment on behalf of the Plan, N.R. and the class for losses due to Defendants' breaches of fiduciary duty and failure to pay Plan benefits;

(c) Declare that Defendants may not apply the Non-Restorative Exclusions or any other plan provisions, policies or practices that wholly exclude or impermissibly limit outpatient speech therapy or other services to treat qualified mental health conditions, when such exclusions and limitations are not predominantly applied to substantially all outpatient medical and surgical services and/or the exclusions and limitations are separate treatment limitations applied only to mental health services;

(d) Enjoin Defendants from further violations of the terms of the Plan as modified by the Parity Act and implementing regulations;

1                         (e) Enter judgment in favor of N.R. and the class for damages in an  
2 amount to be proven at trial due to the failure to provide benefits due under the Plan as  
3 modified by the Parity Act and its implementing regulations;

4                         (f) Award N.R. and the class their attorney fees and costs under ERISA  
5 § 502(g), 29 U.S.C. § 1132(g); and

6                         (g) Award such other relief as is just and proper.

7 DATED: January 24, 2020.

8                         FAIR WORK, P.C.

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18                         By: s/ Eleanor Hamburger  
19                         By: s/ Richard E. Spoonemore  
20                         Eleanor Hamburger (WSBA #26478)  
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